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No. 86-822

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE HOME INSURANCE COMPANY, *et al.*,
Petitioners,

v.

ELI LILLY AND COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is a federal diversity court bound by the answers of the highest court of the relevant state given in response to questions of law certified to the state court?

2. Did the petitioners timely raise the questions they seek to present and, if so, are they presented on this record and do they have any merit?

LIST OF PARTIES

Respondent Eli Lilly and Company was plaintiff-appellee below, urging affirmance of the district court's judgment. Pursuant to Rule 28.1, respondent states that it has no parent company, non-wholly owned subsidiary, or affiliate corporation. The petitioners, defendant-appellants below, are listed in the Petition for a Writ of Certiorari at ii-v. Information regarding their parents, affiliates and subsidiaries appears in the Petition for Certiorari at pp. 1g-18g.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Eli Lilly and Company, plaintiff-appellee in the proceedings below, urges the Court to deny the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 24, 1986.

OPINIONS BELOW, JURISDICTION AND CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent accepts Petitioners' statement as to opinions below, jurisdiction, and constitutional and statutory provisions involved, except respondent contends the Rules of Decision Act, 28 U.S.C. § 1652, is also involved. It provides that: "The laws of the several states, except

where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT OF THE CASE

I. Background

Respondent Eli Lilly and Company ("Lilly") is one of hundreds of companies that manufactured and sold diethylstilbestrol ("DES"), a drug that doctors prescribed for the treatment of certain pregnancy disorders, primarily the prevention of miscarriage. Lilly manufactured and sold DES for this use between 1947 and 1967. In 1971, researchers first reported a statistical association between the use of DES by pregnant women and the discovery, many years later, of a rare form of cancer in a very small percentage of the daughters from those pregnancies. Since that time some researchers have suggested correlations between the use of DES during pregnancy and various other disorders.

Lilly has been named as a defendant in hundreds of product liability lawsuits seeking damages for disorders alleged to be attributable to DES. In every case, the claimant alleges symptoms first manifesting themselves many years after exposure to or use of DES. Each case thus necessarily alleges an injury spanning many years, otherwise there could be no causation and no liability.

The petitioners (the "insurers") are all of the insurers who issued products liability insurance to Lilly from 1947 through 1976, when coverage for DES claims became unavailable. The issue in this case is the meaning of the coverage language, as applied to DES claims. All parties agree that although there are slight variations, the relevant language in all policies is identical in all material respects and is the same as the language contained in the insurance industries' standard Comprehen-

sive General Liability policy form. The insurers disagreed (and still disagree) both with Lilly and among themselves as to what the policies mean under these circumstances.

II. Proceedings Below

On March 9, 1982 Lilly commenced this action for a declaratory judgment as to the meaning of the policy language determining coverage. Lilly sought a declaration that under the policy language coverage as to these delayed manifestation claims was triggered throughout the period from exposure through manifestation. This construction had been given to the same language in *Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

On March 31, 1983, Lilly filed its Motion for Summary Judgment. Lilly argued that summary judgment in its favor was mandated both under the *Keene* decision and under general principles of insurance policy construction. Lilly's position was that (a) Lilly's policies contain the same ambiguous language as that at issue in *Keene*, (b) the injuries allegedly caused by DES, like the injuries at issue in *Keene*, become manifest long after exposure, (c) *Keene* governed this case, and (d) even if *Keene* was not controlling, the general principles of insurance law recognized in Indiana mandated the same result as that reached in *Keene*.

The insurers did not dispute the facts upon which Lilly's motion was based. These were (a) the policy language is what it is, and (b) the disorders the plaintiffs in the underlying cases seek to attribute to DES manifest themselves years after exposure to the product. Rather, the insurers contended extrinsic evidence concerning the "negotiation" of the policies, the subjective expectations of the parties, and the particular etiology of the various DES-related injuries, presented factual issues that pre-

cluded summary judgment.[1] Lilly contended from the outset that the matters the insurers sought to establish through extrinsic evidence were immaterial, both under Indiana law and under the *Keene* decision. Lilly further argued that the insurers proffered evidence presented no factual disputes in any event.

On April 12, 1984, the district court granted Lilly's Motion for Summary Judgment. The district court held that Indiana law, not *Keene*, governs this dispute. Examining that law, the court concluded that the proffered evidence was immaterial as a matter of state law, and that Indiana principles governing construction of ambiguous insurance policy language would lead an Indiana court to adopt the multiple-trigger construction of the relevant language in the context of a delayed manifestation claim. The court therefore granted Lilly the requested declaratory judgment.

The insurers appealed the district court's judgment to the United States Court of Appeals for the District of Columbia Circuit. The gravamen of the appeal was that Indiana law governed the materiality of the proffered evidence and that the district court erred in holding that evidence immaterial under Indiana law. The insurers did not argue that the district court's holding of immateriality violated any constitutional right. Nor did they argue that the multiple trigger construction, determined by the district court to be the most likely one to be chosen by an Indiana court, raised any issue of constitutional dimension. Nor did the insurers argue that

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[1] The insurers also strenuously urged that further discovery was needed concerning these issues. Lilly did not oppose further discovery, and Lilly's motion was briefed again after the insurers had conducted massive additional discovery. Hundreds of thousands of pages of Lilly documents were produced and depositions were taken of nearly every living person at Lilly or at any of Lilly's insurance brokers having anything to do with Lilly's insurance. After that discovery, the insurers again argued that factual issues precluded summary judgment.

summary judgment was improper if their proffered evidence was immaterial as a matter of Indiana law. Finally, the insurers never disputed the district court's holding that the language at issue was ambiguous. Rather, they explicitly argued that the ambiguity of the language necessitated consideration of their proffered evidence as a matter of Indiana law. In short, the only issue raised on appeal by the insurers was whether their proffered extrinsic evidence would be considered under Indiana law, and whether the district court's holding on that issue mandated reversal.[2] Neither side requested certification of state law questions. The insurers did note, however, that Indiana Rule of Appellate Procedure 15(O) authorized certification of questions of Indiana law as to which there are no clear controlling precedents.

The appeal was argued to a panel of the Court of Appeals consisting of Judges Wright, Tamm, and Wald. On June 18, 1985, in an opinion of the court by Judge Wright, and joined by Judge Wald, the court agreed with the district court that Indiana law controls, but was "uncertain about the application of that law to the issues at hand." Pet. App. C at 4c. As a result the court certified the controlling questions of state law to the Indiana Supreme Court.[3]

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[2] With respect to each category of evidence the insurers claimed precluded summary judgment, all insurers argued that the district court had erred in treating the evidence as immaterial because an Indiana court would deem it material. Joint Brief of Defendants-Appellants, *passim*. The insurers recognized that "the district court held that—although an Indiana court would find the policy language ambiguous as applied to DES claims—all the defendants' proffered evidence was immaterial. . . ." *Id.* 38-39. The insurers continued: "The district court's premise is clearly wrong. Indiana would consider the defendants' substantial proffer of evidence . . . the district court ruled immaterial evidence of the precise type actually used by Indiana courts in construing insurance contracts found to be ambiguous." *Id.* 39.

[3] Judge Tamm dissented from the certification, urging affirmance of the district court's judgment and arguing that certifying the

Neither side sought any clarification or modification of the questions certified in the Court of Appeals. Neither filed or asked for leave to file any supplemental briefing before the Indiana Supreme Court. The Indiana Supreme Court had before it the insurers' detailed recitation of the specific extrinsic evidence they claimed should be considered in the interpretation of the policy language, copies of the insurers' proffered evidence, and the insurers' lengthy arguments as to why the evidence was material under Indiana law.

In a clear and concise opinion, a unanimous Indiana Supreme Court agreed completely with the district court's interpretation of Indiana law. The Indiana Supreme Court held that the extrinsic evidence proffered by the insurers was immaterial, and stated that the "construction of the ambiguous policy language should be resolved by the court as a matter of law." Pet. App. B at 6b. Finally, authoritatively construing the ambiguous policy language, the Indiana Supreme Court adopted the multiple trigger interpretation as the law of Indiana: "We hold that coverage is triggered at any point between ingestion of DES and the manifestation of a DES-related disease." *Id.* at 7b.

The insurers then filed a petition for rehearing and a 46-page brief in the Indiana court. The insurers argued that the Indiana decision actually recognized the materiality of their proffered extrinsic evidence on "authorship" and medical issues. Alternatively, the insurers argued that if the Indiana Supreme Court rejected their reading of its decision, then the Indiana common law was unconstitutional because it denied them a hearing, created irrebutable presumptions, impermissibly classified them, and deprived them of vested rights by ex post facto judicial fiat, all in violation of various provisions of the federal constitution. None of these constitutional issues

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issues to the Indiana Supreme Court "is needlessly time-consuming." Pet. App. C at 17c.

had been asserted when Lilly asked for the requested judgment, when the district court granted it, or in the Court of Appeals.

After denial of their petition for rehearing in the Indiana Supreme Court, the insurers were permitted to file post-certification briefing before the Court of Appeals. In that briefing the insurers again maintained that the Indiana decision actually held their proffered evidence to be material and in the alternative asserted, for the first time in the Court of Appeals, their newly-found constitutional issues.

On June 24, 1986, a unanimous panel of the Court of Appeals consisting of Judges Edwards, Scalia, and Wright, affirmed the judgment of the district court.[4] The Court of Appeals rejected the insurers' attempts to interpret the Indiana Supreme Court's certification decision as a holding that their proffered extrinsic evidence was material. With respect to the proffered evidence of authorship of the policies, the court stated that the "short answer to appellants' contentions is that the Indiana court did *not* make authorship a predicate of the general rules controlling the construction of insurance contracts or of its holdings in this case." Pet. App. A at 8a. The court expressly recognized that although the Indiana court's determinations of the substantive law of Indiana defining the material issues in the case were binding on a federal diversity court, the Indiana court could not determine what evidence was probative of those issues. Rather, issues of relevance were to be determined under the fedral rules of evidence. In response to the insurers' argument concerning the admissibility of its proffered evidence on etiology, the Court of Appeals stated:

> "Appellants flatly misread the Indiana opinion. The Indiana court said that '*coverage* is triggered at any

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[4] Judge Tamm died before the case returned to the Court of Appeals from the Indiana Supreme Court. Judge (now Justice) Scalia replaced Judge Tamm on the panel. Judge Wald subsequently recused herself and was replaced by Judge Edwards.

> point between ingestion of DES and the manifestation of a DES-related disease.' 482 N.E.2d at 471 (emphasis added). There is no requirement that diagnosable 'injury' be shown during the time the insurer is on the risk." *Id.* at 10a. (footnote omitted).

The Court of Appeals rejected the insurers' attempt to mount a constitutional challenge to the judgment of the district court, holding that the constitutional arguments had been waived. The court observed that "all of the rulings that appellants find to be constitutionally offensive were stated with some precision in the district court's memorandum opinion." *Id.* at 11a. Applying the settled rule that litigants must raise their claims in their initial appeal, the court held those issues waived.

Accordingly, the Court of Appeals affirmed the district court's declaratory judgment. The insurers' petition for rehearing and suggestion for rehearing en banc were denied without dissent. No member of the court requested a vote on the suggestion for rehearing en banc.

SUMMARY OF ARGUMENT

Indiana law governs this case. This is a diversity case in which the sole issue is the meaning of certain insurance policies under Indiana law. The Court of Appeals certified the dispositive interpretation issues to the Supreme Court of Indiana. The Indiana Supreme Court adopted the construction of the policy language urged by Lilly and adopted by the district court. In doing so, the Indiana court considered the issues and evidence that the insurers claimed were material to that construction, but ruled the issues raised by the insurers immaterial as a matter of state law. Accordingly, the federal Court of Appeals properly affirmed the district court's declaratory judgment. Given the authoritative interpretation of the policies under Indiana law by the Indiana Supreme Court, the Court of Appeals' judgment was compelled by fundamental *Erie* doctrine. It presents no question which has not been long ago resolved by this Court.

The insurers present no special or important reason for this Court to exercise its discretionary certiorari jurisdiction. Differing interpretations of insurance policy language made by various courts of appeals following the laws of different states present no conflict in the circuits within the meaning of Rule 17.1(A). Under *Erie*, such conflicts are inherent in our system of federalism and cannot be resolved by this Court.

The proper relationship between federal and state courts was observed. There are two short answers to the insurers' contention that the Court of Appeals improperly deferred to the Indiana court's determination that the policy language is ambiguous. First, the district court specifically held the language to be ambiguous. The insurers did not appeal from that determination; rather they embraced it, arguing that because of the ambiguity, they were entitled to present extrinsic evidence under Indiana law. Accordingly, the issue of ambiguity, whether characterized as a question of law or a factual determination, was not preserved in the Court of Appeals. Second, if the issue had been presented, under well-settled doctrine, the issue of ambiguity is itself clearly a question of state law under *Erie*. The basic position urged by the insurers—that contractual language can have some sort of fixed meaning as a matter of federal law, irrespective of the state law which is the source of the contract and governs its interpretation and construction—is simply a frivolous invitation to this Court to resurrect the discarded conception of law as a brooding omnipresence enunciated in *Swift v. Tyson*.

The constitutional issues were waived. The purported constitutional violations raised by the insurers were clearly waived. The district court held that the evidence proffered by the insurers was immaterial as a matter of state law and therefore entered summary judgment in favor of Lilly. If any colorable claim of constitutional violation occurred, it occurred when the district court

granted summary judgment. The insurers' failure to raise their constitutional arguments on appeal clearly constituted a waiver of these arguments.

The constitutional issues are frivolous. The reason the insurers' constitutional objections were not initially raised on appeal is that they are wholly lacking in merit. The insurers' constitutional arguments amount to no more than saying that any grant of summary judgment deprives the party opposing the motion of the opportunity to present its evidence at trial. But no party has a constitutional right to an unnecessary trial. The insurers' evidence was considered by the district court and determined to be immaterial. Hence there was no need for a trial. The Indiana Supreme Court confirmed that this evidence was immaterial under Indiana law. In short, the insurers were not treated fundamentally differently from any other contracting parties. Nor can a rule of construction promoting the basic purpose of a contract, which in the case of an insurance policy is indemnity, be considered to create a classification that is presumptively invidious. The Indiana rules of construction dealing with insurance policies are time-honored common law principles rooted firmly in the law of contracts and insurance. No issue of constitutional dimension is presented by the routine application of those principles to the insurance policies involved in this case.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' JUDGMENT WAS COMPELLED BY FUNDAMENTAL ERIE DOCTRINE

A week after this Court's landmark decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), this Court settled the only federal question presented by this case—whether state law governs questions concerning the proper construction of insurance policies. In *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 205 (1938), the Court held that the "subject is now to be governed . . . by the

decisions of the appropriate state court." Indeed, as tne Court in *Ruhlin* observed, even before *Erie* the federal courts were to defer to the appropriate state court's interpretation of specific provisions of insurance policies. In *Mutual Life Insurance Co. v. Johnson*, 293 U.S. 335, 340 (1934), Justice Cardozo, writing for a unanimous Court, stated:

> "All that is here for our decision is the meaning, the tacit implications, of a particular set of words, which, as experience has shown, may yield a different answer to this reader and to that one. With choice so 'balanced with doubt,' we accept as our guide the law declared by the state where the contract had its being."

In *Johnson*, confronted with an authoritative state court declaration as "to the meaning and obligation of [an insurance] policy . . . provision substantially the same as the one in controversy" before it, the Court concluded that it was

> "not under a duty to make a choice for ourselves between alternative constructions as if the courts of the place of the contract were silent or uncertain. Without suggesting an independent preference either one way or the other, we yield to the judges of Virginia, expounding a Virginia policy and adjudging its effect." 293 U.S. at 339.

In *Ruhlin*, this Court observed that the *Erie* decision "goes further, and settles the question of power." 304 U.S. at 205.

All that is involved in this case is the meaning of a particular set of words contained in Indiana insurance policies. The Indiana Supreme Court has authoritatively declared the meaning of those words, and under doctrine settled for a half a century, its decision is binding upon the federal courts. In summary, "the interpretation and legal effect of policies of insurance . . . are peculiarly matters of local concern." *Pink v. A.A.A. Highway Ex-*

press, Inc., 314 U.S. 201, 211 (1941). The insurers' basic arguments are nothing less than invitations to have a federal court substitute its construction of Indiana insurance policies for the one adopted by the Indiana Supreme Court, in derogation of settled *Erie* doctrine.

II. THERE IS NO CONFLICT IN THE CIRCUITS BECAUSE EACH APPLIED THE LAW OF A DIFFERENT STATE

The insurers observe that federal courts grappling with diversity actions over insurance coverage for time-delayed claims have adopted various interpretations of substantially the same policy language "purporting" to follow state law. Pet. at 10.[5] The insurers also note that some courts have held the language to be ambiguous, and others have held it to be unambiguous.

It is elementary that these conflicting interpretations present no question for this Court to review. "As to questions controlled by state law, . . . conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts." *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 206 (1938). Here, since the interpretation of the policy language is governed by state law, the conflicting interpretations of the policies are directly attributable to the various federal courts' view of the law of the several states involved.

While in some of those cases it might be argued that the federal court incorrectly ascertained state law, or even failed to attempt to apply state law and instead applied its own view of the proper interpretation of the language, no such objection can be made to the judgment in this case. The Court of Appeals here certified the dispositive

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[5] Often these positions are the result of the application of the rule favoring the construction advanced by the insured. Different insureds have argued for different rules.

questions to the proper state court, eliminating all questions as to whether it was following state law.[6]

Notwithstanding this Court's clear pronouncements that state law governs the meaning of an insurance policy and that the federal courts must follow authoritative state court constructions of policy language, the insurers attempt to gin up a conflict in the circuits by characterizing the issue as one of fact, to be answered in a diversity action by an independent federal fact-finder.

The Fifth Circuit cases cited by the insurers, like the decision of the Court of Appeals in the case, are entirely consistent with this Court's pronouncements that a state court's interpretation of policy language is binding on a federal diversity court. No conflict in the circuits is remotely presented. Three of those cases, *Paul Revere Life Insurance Co. v. First National Bank in Dallas*, 359 F.2d 641 (5th Cir. 1966) (en banc); *St. Paul Mercury Insurance Co. v. Price*, 359 F.2d 74 (5th Cir. 1966); and *United Services Life Insurance Co. v. Delaney*, 358 F.2d 714 (5th Cir. 1966) (per curiam) (en banc), all involved the same coverage question and simply held that a Texas case construing "wholly different" policy language was distinguishable and hence not controlling. *Paul Revere Life Insurance Co. v. First National Bank in Dallas*, 359 F.2d at 643.[7]

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[6] Insurers refer to the call for review by one court based on a concern that "many of the courts involved are not even attempting to apply state law in reaching their results," *American Home Products Corp. v. Liberty Mutual Insurance Co.*, 565 F.Supp. 1485, 1512 (S.D.N.Y. 1983), *aff. as mod.*, 748 F.2d 760 (2d Cir. 1984). Whatever the merits of the view, it has no application here because the Court of Appeals clearly did apply Indiana law.

[7] Although the federal court in these cases ultimately itself held that the policy language in the cases before them was not ambiguous, prior to doing so, it had abstained from deciding the ambiguity issue and instructed the parties "to institute declaratory judgment proceedings in the Texas state courts for determination of coverage, a state question which presented the single issue in each of the

In *South Hampton Co. v. Stinnes Corp.*, 733 F.2d 1108, 1115 (5th Cir. 1984), the court held that it would adopt the interpretation adopted by an earlier state court "absent some indication that a later Texas court would do otherwise. . . ."[8] Here, of course, we have not just an indication but a declaration of Indiana law, and one made as recently as possible.

At bottom, petitioners' "conflict in the circuits" argument simply ignores the Indiana Supreme Court's dispositive holdings. The first of these is that given the Indiana view of the meaning of the concept "when" an "injury" is alleged to "occur" in the context of a delayed

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cases." *Paul Revere Life Insurance Co. v. First National Bank in Dallas*, 359 F.2d at 641. It was only *after* the state courts refused to entertain the declaratory judgment proceedings (on grounds that they sought advisory opinions) that the Fifth Circuit determined as best it could the coverage issue applying available indications of state law. Hence, the Fifth Circuit cases clearly present no conflict—the Fifth Circuit attempted to adopt the very approach taken by the Court of Appeals in this case, and the action of the Fifth Circuit in directing the parties to institute declaratory judgment proceedings in the Texas state courts directly refutes the insurers' argument that coverage issues under insurance policies are to be decided by reference to some non-existent body of federal common law, rather than state law.

[8] To the extent the *South Hampton Co.* decision suggests that the court would merely follow the state court's interpretation, and not in some abstract sense be bound by it, the decision on that question too was determined by the federal court as a matter of state law. The court indicated that because a later Texas court would not be bound by the prior state court's interpretation of the contract provision, the federal court acting as a court of the state under *Erie* principles would similarly not be technically bound. In any event, the difference between the Fifth Circuit's holding that it would follow the state court's construction absent indication that a later Texas court would do otherwise, and the explicit recognition that the state court's interpretation is "binding," where the state ruling is on certification in the same case represents no conflict in circuit doctrine. It is merely the application of that doctrine to different circumstances.

manifestation claim, the evidence proffered by the insurers was immaterial as a matter of Indiana law. The second is that the policy language is to be interpreted as a matter of Indiana law to provide multiple trigger coverage as held by the district court. The insurers assert that no court of appeals except the court in this case has ever sought to apply insurance policies to claims of injury while denying insurers the right to present medical evidence on the existence or not of injury.[9] But there is nothing odd about a court's holding that it is for the court to determine what a contract means. Neither the Indiana Supreme Court's holdings nor the Court of Appeals' application of them presents any conflict in the circuits for resolution by this Court.

III. THE INSURERS HAVE WAIVED ANY ARGUMENT CONCERNING THE AMBIGUITY OF THE POLICY LANGUAGE. IN ANY EVENT THE QUESTION IS ONE OF STATE LAW, NOT FACT

The insurers argue that the Court of Appeals should have determined whether or not the policy language was ambiguous for itself, and not deferred to the Indiana court's decision in this respect. Petitioners characterize the issue of ambiguity as one of fact and argue that a federal court sitting in a diversity case must determine the facts for itself.

First, the issue was resolved by a federal court. The district court in this case held that the language in question was ambiguous, applying the Indiana rule for determining ambiguity. The insurers did not appeal from that determination, and have received whatever federal determination of that issue to which they were arguably

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[9] As the Court of Appeals correctly observed, the insurers' argument amounted to an attempt "to transform the Indiana opinion from an adoption of the *Keene* multiple trigger rule into the 'injury in fact' view" adopted by the Second Circuit as New York law. Pet. App. A at 10a n.12.

entitled. Even if the Court of Appeals did not itself review that determination of the district court (and under the petitioners' theory the determination would be subject to a clearly erroneous standard of review) the insurers have no one to blame but themselves for failing to raise the issue on appeal.

Moreover, implicit in the Court of Appeals' decision certifying questions for review by the Indiana Supreme Court is a determination of ambiguity by the Court of Appeals. The Court of Appeals stated that the operative terms of the policy were not defined with precision, and significantly, certified questions to the Indiana Supreme Court which were only possibly germane if the language of the policies were deemed by it to be ambiguous.[10]

The insurers seize on the Court of Appeals' recent decision in *Abex Corp. v. Maryland Casualty Co.*, 790 F.2d 119 (D.C. Cir. 1986) (applying New York law). In *Abex*, the insurers argue, the court held the very same policy language to be unambiguous, and assert that *Abex* and this case cannot be reconciled on the basis that the common law of different states was involved. To the contrary, that is exactly the distinction between the cases, as *Abex* itself clearly demonstrates and as this case holds. Indeed, two of the three judges who decided this case also decided *Abex*. In *Abex*, New York insurance policies containing the standard form trigger language were at issue. The Second Circuit had already rendered a decision predicting how the New York courts would interpret the language, holding that the New York courts would view the language as unambiguous and adopting an injury in fact construction of the language. The *Abex* court, recognizing its obligation to apply New York

[10] In their petition for rehearing in the Court of Appeals, the insurers themselves recognized that the "certification opinion certainly indicates that [the Court of Appeals] may have deemed the language ambiguous . . . ." Pet. for Rehearing of Appellants at 8 (July 24, 1986).

law decided to "defer to the local circuit's view of the law of a state in its jurisdiction".[11] 790 F.2d at 125.

The insurers' argument boils down to the claim that it is impossible for the language to be unambiguous under New York Law and ambiguous under Indiana law because of the similarity between New York and Indiana standards for determining ambiguity. This is absurd. That is what the Indiana Supreme Court applying Indiana law and the Second Circuit applying New York law have held. Whatever the language of the opinions, the bottom line is that the district court held the policy ambiguous and the Indiana Supreme Court agreed. That holding is clearly correct on this record.

The determination of ambiguity vel non—indeed the very legal significance of even making a determination of ambiguity vel non—are solely questions of state law. They are merely one category of "questions concerning the proper construction" of insurance policies. *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 205 (1938).

It is well settled that the federal court sitting in diversity must follow state court determinations on the issue of ambiguity of an insurance policy. Justice (then Judge) Blackmun, when sitting on the Eighth Circuit, was presented with just that question in *Hanover Insurance Co. v. The Travelers Indemnity Co.*, 318 F.2d 306 (8th Cir. 1963). When confronted with an interpretative question of an insurance policy governed by Missouri law, Justice Blackmun surveyed the cases, ob-

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[11] The *Abex* court did opine in *dictum* that the Second Circuit's interpretation of the language was more consistent with its own reading of the insurance policies than was the multiple trigger interpretation. *Abex Corp. v. Maryland Casualty Co.*, 790 F.2d at 126. Nevertheless, *Abex* is crystal clear on the obligation of the federal court to follow *Erie*, and to give the policy language the same construction that would be adopted by the state court of last resort.

serving: "Some of these cases hold that the policy language is clear and unambiguous. Others conclude that it is ambiguous and resolve the ambiguity, as usual, against the insurer which issued the policy." *Id.* at 308. A prior Missouri case had declared the language to be unambiguous. Justice Blackmun, writing for the court, held that state decision "settled" the ambiguity question for the court. *Id.* at 308.

Petitioners cite no case in which a federal court refused to follow a state court's determination of ambiguity vel non with respect to an insurance policy governed by the law of that state. Indeed, the very cases cited by petitioners follow such state court determinations. In *Clay v. Sun Insurance Office, Ltd.*, 363 U.S. 207, 212 (1960), this Court vacated and remanded for the Court of Appeals to certify questions of the interpretation of policies to the state court, noting that these questions were "unresolved state law" questions, and further observing that the state court would "authoritatively" resolve such issues. In the appeal after remand, the court observed that the "meaning" of the insurance policy provision was a "local law question." *Clay v. Sun Insurance Office, Ltd.*, 377 U.S. 179, 180 & n.3 (1964). The state court had resolved the issue by applying the settled rule of construing an ambiguous insurance policy in favor of the insured. *Sun Insurance Office Ltd. v. Clay*, 133 So.2d 735, 739 (Fla. 1961).[12]

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[12] In *Barnes v. Atlantic & Pacific Life Insurance Co.*, 530 F.2d 98, 100 (5th Cir. 1976) (per curiam), also cited by petitioners, the court in fact deferred to the state court's interpretation of the meaning of the policy, including the issue of ambiguity. In another opinion in the same case the court stated: "We are acutely aware of how identical contract language takes on diverse meanings when viewed from opposite sides of that imaginary line separating two adjacent states. Understandably, policy considerations differ in their impact on the jurisprudence of individual states." 514 F.2d

In sum, once the Indiana Supreme Court ruled that the policy language was ambiguous as a matter of Indiana law, the federal diversity court is not free to substitute its own judgment for that of the Indiana Supreme Court. Were there a transcendental body of contract law existing outside of a state but obligatory within it, petitioners might have something to talk about. But there is no such body of contract law, and at bottom, petitioners' argument simply flies in the face of *Erie*.[13]

IV. PETITIONERS' CONSTITUTIONAL ARGUMENTS HAVE BEEN WAIVED AND IN ANY EVENT ARE FRIVOLOUS

Petitioners' asserted constitutional violations flow from the district court's entry of summary judgment. The insurers claim that decision deprived them of a meaningful opportunity to be heard and present what they claim to be relevant evidence in a trial on the merits. On appeal, however, the insurers did not attack the district court's judgment on due process or equal protection grounds.

704, 706. The court specifically certified the question of ambiguity. *Id.* at 709. Similarly, in *Tyler v. Insurance Co. of North America, Inc.*, 539 F.2d 1072, 1074 (5th Cir. 1976), the Fifth Circuit certified the question of the meaning of contractual provisions as applied to the facts and held that the state court determination was binding on it. Finally, "The Fifth Circuit's early suggestion [in *Sun Insurance Office Ltd. v. Clay*, 319 F.2d 505, 508-509] that answers to certified questions are 'merely advisory and entitled, like dicta, to be given persuasive but not binding effect as a precedent,' has long since been forgotten and it is now accepted that the state answers are binding." 17 C. Wright, A. Miller, and E. Cooper, Federal Practice & Procedure § 4248 at 532 (1978).

[13] A particular set of words may have a fixed legal meaning in one jurisdiction—a meaning of fixed, of course, by the courts of the state—which until the court adopts the construction, would otherwise be ambiguous and susceptible of various meanings. That is, of course, the result of this very litigation. An ambiguous provision in an insurance policy has now been given a clear legal meaning under the law that governs its construction.

They did not attempt to fashion a bootstrap procedural due process issue out of their argument that the district court erroneously determined that there were no material genuine issues of fact for trial. Nor did they assert any equal protection clause violation. Had the Court of Appeals, as urged by Judge Tamm, simply affirmed the judgment of the district court without certifying questions to the Indiana Supreme Court, it would be obvious that the insurers had waived any constitutional challenges to the district court's judgment.

The Court of Appeals correctly held that petitioners had waived their constitutional arguments by failing to raise them initially on appeal. As the Court of Appeals observed, once the district court rendered its decision, a constitutional attack on its construction of Indiana law was ripe for review. Moreover, all of the legal rulings that the insurers now allege to be constitutionally infirm were stated in the district court's opinion. If petitioners believed that the district court's judgment violated their constitutional rights, they were required to raise those issues on appeal. They did not do so. Rather, they wedded themselves to the argument that the district court's judgment was simply erroneous as a matter of Indiana law.

The petitioners' reliance on *Bellotti v. Baird*, 428 U.S. 132, 148 (1976) is misplaced. This Court's pronouncement in *Bellotti*—that in the context of that case it was impossible to define precisely the constitutional issues presented in the absence of an authoritative state law construction of a state statute—is wholly inapposite here. It is settled that this Court, as the ultimate expositor of the constitution, must be cautious in framing rules of constitutional law no broader than is absolutely necessary to decide the case before it. *See generally, Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). But, clearly *parties* cannot argue that they require an authoritative declaration by

the state supreme court before raising a constitutional challenge to state law. The parties in this case received a declaration of state law in the district court. If they wished to appeal it on these constitutional grounds they could have done so. They did not, and that is that.

The insurers' constitutional arguments are as meritless as they are untimely. The insurers' procedural due process argument is simply premised on a view of Indiana law explicitly rejected by the Indiana Supreme Court. Petitioners continue to maintain that their proffered evidence is material, and hence reason that the failure to consider that evidence deprived them of a meaningful opportunity to be heard. The short answer to petitioners' contention is that a party does not have a right to present immaterial evidence. Moreover, petitioners were granted a hearing appropriate to the nature of the case—namely a hearing on the motion for summary judgment.[14]

Petitioners' equal protection clause argument is equally meritless. The classification created by the Indiana common law is suspect, we are told, because it impinges upon petitioners' right to be heard. Having attempted to fashion a suspect classification out of an alleged procedural due process violation, the insurers continue by arguing that while Indiana has a legitimate governmental objective in promoting indemnity from insurance policies, the Indiana construction of this policy "furthers only an indemnity that is by definition unrelated to the contract's stated purpose." The "definition" to which the insurers refer is not the construction of the policy adopted by the

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[14] Petitioners also appear to be attempting to make a substantive due process argument as well, arguing that the Indiana common law somehow violates due process because one panel of the Court of Appeals of the District of Columbia opined that the multiple trigger interpretation of the policy language was "linguistically unsound." *Abex Corp. v. Maryland Casualty Co.*, 790 F.2d at 124-27. The proposition does not survive its statement.

Indiana Supreme Court, but is some still unspecified construction of the policy language about which the insurers themselves continue to disagree. It is axiomatic that the function of law is to classify, and that state law classifications relating only to business and economic interests are upheld under a rational basis test. Promoting indemnity is obviously a rational basis for a rule of construction governing insurance policies and the Constitution surely is not offended by holding the insurers to a legal construction of the written words by which they agreed to be bound.

For many reasons the Indiana rule is a wise one.[15] However, it is simply not this Court's function in our federal system to pass on the wisdom of the several competing interpretations of insurance policy language adopted by various courts applying the law of various states.

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[15] Indeed, the result reached here is almost universally recognized as the best of the judicial solutions to these coverage disputes. *See, e.g.*, Obremski, *"Toxic Tort" Litigation and the Insurance Coverage Controversy*, 34 Fed. Ins. C.Q. 3, 22 (1983); *Special Project—An Analysis of the Legal, Social and Political Issues Raised by Asbestos Litigation*, 36 Vand. L. Rev. 573, 726 (1983); Note, *Adjudicating Asbestos Insurance Liability: Alternatives to Contract Analysis*, 97 Harv. L. Rev. 739, 758 (1984); Note, *Insurer Liability in the Asbestos Disease Context—Application of the Reasonable Expectations Doctrine*, 27 S. Dakota L. Rev. 239, 257 (1982); Note, *Liability Cure-All for Insidious Disease Claims*, 11 Pepperdine L. Rev. 125, 143 (1983); Note, *Insurance Law And Asbestos—When Is Coverage of a Progressive Disease Triggered?* 58 Wash. L. Rev. 63, 87 (1982); Note, *Manifestation: The Least Defensible Insurance Coverage Theory for Asbestos-Related Disease Suits*, 7 U. Puget Sound L. Rev. 167, 182 (1983).

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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